

82D CONGRESS  
2d Session

HOUSE OF REPRESENTATIVES

REPORT  
No. 2438

## PRICE DISCRIMINATION—DEFENSE UNDER ROBINSON-PATMAN ACT

JULY 2, 1952.—Referred to the House Calendar and ordered to be printed

Mr. WALTER, from the Committee on the Judiciary, submitted the  
following

### REPORT

[To accompany S. 719]

The Committee on the Judiciary, to whom was referred the bill (S. 719) to establish beyond doubt that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet the equally low price of a competitor, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

#### STATEMENT

The primary purpose of this bill is to conform statutory law to the interpretation of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526, 15 U. S. C., sec. 13), recently enunciated by the Supreme Court in *Standard Oil Company v. Federal Trade Commission* (340 U. S. 231 (1951)).

This bill will also end the freight absorption controversy<sup>1</sup> insofar as the Clayton Act is concerned. When introducing this bill the chairman of the Senate Committee on the Judiciary stated:

Senators will remember that I recently discussed the Supreme Court decision in the *Standard Oil* case. The bill which I have just introduced would reaffirm the doctrine of that decision, and write it into permanent law.

This bill Mr. President, borrows from the language of the Court itself, in the *Standard Oil* case. It does not change the doctrine laid down in that case. It does not extend it, or contract it. It merely asserts, in statutory form, what the Court, in the *Standard Oil* case, declared to be the law.

<sup>1</sup> This controversy has also been referred to as the "basing point controversy," but such a reference is misleading and should be avoided since it is settled law that use of a basing point pricing system is unlawful. See *Corn Products Refining Co. v. Federal Trade Commission* (324 U. S. 726 (1945)); *Federal Trade Commission v. Cement Institute* (33 U. S. 683 (1948)).

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At the same time Senator Johnson of Colorado, chairman of the Committee on Interstate and Foreign Commerce of the Senate and a cosponsor of this bill, added these remarks:

My concern in this matter relates primarily to freight absorption. This bill applies to a seller lowering his price in good faith to meet a competitor's lower price. This is a complete solution to the freight absorption problem, as far as the Clayton Act is concerned, for freight absorption is merely one means by which a seller reduces his price to meet the lower price of a competitor. Whenever a seller absorbs freight to meet the lower price of a competitor who is located nearer to the buyer he is not doing anything other than to reduce his price to meet the equally low price of a competitor.

### CONSTRUCTION OF THE EXISTING STATUTE

The issues resolved by this legislation were met in the Supreme Court decision in *Standard Oil Company v. Federal Trade Commission* (340 U. S. 231 (Jan. 8, 1951)). In that case the Federal Trade Commission, under section 2 of the Clayton Act (as amended by the Robinson-Patman Act), charged the Standard Oil Co. with discriminatory pricing in that it sold gasoline to four customers in the Detroit area at a lower price than was made available to other customers in that area. The Standard Oil Co., among other defenses, stated that this price discrimination was justified because it was made to retain customers and to meet in good faith the equally low price of a competitor.

The good-faith defense was based upon application of subsection 2 (b) of the Clayton Act which states in its proviso:

*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

The Federal Trade Commission took the position that this proviso was merely a procedural defense and did not provide a complete defense to a charge of discrimination. It was the view of the Federal Trade Commission that this proviso merely placed upon the Commission the burden of proving that the discrimination in prices or facilities had an adverse effect on competition as distinguished from a presumption by the Commission that the effect of the discrimination on competition was adverse.

### CONSTRUCTION OF LANGUAGE USED

There has been considerable debate concerning the meaning of the language which is employed in section 2 (b) of the Clayton Act, as it now exists, and some of this language is repeated in the pending bill as a proposed section 2 (g) of that act. We concur with the view of the Supreme Court in the *Standard Oil* case, quoting from an earlier case.<sup>2</sup>

In appraising the evidence, the Commission recognized that the statute does not place an impossible burden upon sellers, but it emphasized the good-faith requirement of the statute, which places the burden of proving good faith on the seller. \* \* \* We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

<sup>2</sup> *Federal Trade Commission v. A. E. Staley Manufacturing Co.* (324 U. S. 746) (1945) at 759.

Attention is also directed to the Court's assertion that the plain language of the statute and established practice permits a seller "to retain a customer by meeting in good faith the price offered to that customer without necessarily changing the seller's price to its other customers." The Supreme Court, in the Standard Oil case, has construed the Robinson-Patman Act as having been intended by Congress to preserve active competition, and found that the statute did not prohibit a seller from engaging in active good-faith competition merely because the beneficiaries of a seller's price reductions "may derive a competitive advantage."

This bill translates the foregoing majority decision of the Supreme Court in the Standard Oil case into the present statutory law by providing, in the proposed section 2 (g) of the Clayton Act, that it shall be a full defense to a charge of price discrimination (or discrimination in services or facilities) for a seller to show that he was acting in good faith to meet the equally low price (or equally extensive services or facilities) offered by a competitor. This legislation will rule out the possibility of a future construction of section 2 of the Clayton Act in accordance with the view of the minority of the Supreme Court in the Standard Oil case. The view of the minority was that the Congress had intended to "weaken competition" by prohibiting price discriminations which adversely affected competition at the resale level.

This view of the minority was underlined in testimony on this measure by the Federal Trade Commission. However, the opinions of the Department of Justice in this matter were to the contrary, thus fully expressing the necessity for clarifying the law through the enactment of this legislation.

#### LEGALITY OF THE PRICE BEING MET

This bill contains the proviso—

That a seller shall not be deemed to have acted in good faith if he knew or should have known that the lower price or more extensive services or facilities which he met were in fact unlawful.

In this respect the seller must act, as stated by the Supreme Court, as "a reasonable and prudent person."

In the Standard Oil case the Court reaffirmed its holding in *Federal Trade Commission v. A. E. Staley Mfg. Co.* (324 U. S. 746), to the effect that a seller was not acting in good faith who simply adopted in toto the unlawful pricing system of a competitor. This bill will not permit a seller to meet a pricing system which he knows is unlawful, nor does it permit a seller to meet a price which he, as a reasonable and prudent person, should know is unlawful.

On the other hand, there appears to be no substantial basis for fears that have been expressed over the difficulties confronting a seller who may not know whether he is actually meeting a lawful price. In the Staley case the Supreme Court stated that the law places no impossible burden on sellers. The proposed amendment adopts the standards of the Staley case by providing expressly that only where the seller knew or should have known of the illegality of his competitor's prices, is he in jeopardy of being found to be acting in bad faith. This is most likely to occur when, as in the Staley case, the seller adopts his competitor's entire pricing system, which system he should have known

was an unlawful pricing system. Adoption of a competitor's quantity discount schedule, possibly one providing cumulative volume discounts, which on its face could not meet the standards of the statute would similarly put a seller on notice that his good faith defense may fail.

Certainly a seller would not be held responsible, under normal conditions, to judge at his peril whether his competitor could justify the lower price that was being met. Competitors do not normally have ready access to one another's books of account. In the ordinary course the seller may safely start with the assumption that the lower price of a competitor which he is meeting is lawful. But he may not close his eyes to obvious facts which might require a contrary conclusion, nor ignore warnings of such a nature as to put a reasonable man on notice to that effect.

In other words, S. 719 takes a middle course between two extreme views. The first of the extreme positions rejected by S. 719 is that a seller must act at his peril and may innocently violate the statute if at some future date, it turns out that the competitive price which was met was in fact an unlawful price. The second extreme position negated by S. 719 is that a seller should be permitted only to meet unlawful prices and should never be permitted to lower his price in good faith to meet the lawful price. Furthermore, S. 719 does not adopt another alternative view under which the seller would be permitted to meet a competitor's price whether the price was lawful or unlawful. The adoption of this last view would, of course, be a definite reversal of the *Staley* case which S. 719 reaffirms.

The committee carefully considered whether or not any of the language in S. 719 could be interpreted as meaning that a seller would be permitted to meet the lower price of a competitor in order to obtain new customers, as distinguished from the fact situation in the *Standard of Indiana* case which involved lowering prices to retain customers.

The committee intends that the language of S. 719 is not be interpreted to determine whether or not the good faith defense would or would not be available when a seller lowered his price in good faith in order to obtain customers. This question of applying the good faith defense in obtaining customers, has not been as yet decided by the courts, and the language of S. 719 in no way changes existing law and thus does not provide the courts with a guide should such a case arise.

It is clearly the intention of the committee that S. 719 in no way affects the state of the law on the issue of obtaining customers. That question must be ultimately resolved by the courts.

#### FREIGHT ABSORPTION

For almost 3 years the Congress has been deeply concerned over the legality of competitive (nonconspiratorial) freight absorption. See hearings on Senate Resolution 241, Eightieth Congress; hearings on S. 236, Eighty-first Congress; and hearings on S. 1008, Eighty-first Congress (in both Senate and House of Representatives). Those hearings, and the congressional debates on S. 1008 in the Eighty-first Congress, abundantly demonstrate that the Congress and the public overwhelmingly approve the propriety of freight absorption when it is used for competitive purposes and not for conspiratorial or predatory purposes.

Whenever a seller absorbs freight in good faith to meet the lower price of a competitor who is located closer to the customer, and therefore enjoys the benefit of a lower transportation charge, he is merely reducing his price in good faith to meet the equally low price of a competitor. Dicta in the Cement Institute case to the contrary has been superseded by the holding of the Supreme Court in the Standard Oil case.

The amendment to the Clayton Act here proposed, and the Supreme Court decision in the Standard Oil case will eliminate further need for legislation under the Clayton Act as to freight absorption. The enactment of this amendment would make it clear that freight absorption for the proper purposes, approved by the Congress and the public and herein described, is within the purview of the good faith proviso of section 2 (b) of the Clayton Act as construed by the Supreme Court in the Standard Oil case.

The committee found that the language of S. 719 in no way prevents reliance by the Federal Trade Commission or the Department of Justice on uniformity of prices as evidence of conspiracy. This legislation has nothing to do with proof of conspiracy and it is not the intention of the committee to overrule the majority opinion in the Cement Institute case.

Attached hereto, as appendixes to this report, are a letter dated July 10, 1951, from Peyton Ford, Deputy Attorney General, to the chairman of the Committee on the Judiciary, Emanuel Celler, and a letter dated July 13, 1952, from Peyton Ford, Deputy Attorney General, to the chairman of the Committee on the Judiciary, Emanuel Celler, regarding H. R. 2820, a companion measure to S. 719 which was jointly considered with S. 719 during the committee's hearings. The views of the Federal Trade Commission in opposition to this legislation were furnished to the committee through a statement made by Commissioner Stephen J. Spingarn on July 11, 1951, and subsequent dates.

DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, July 10, 1951.

HON. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, D. C.*

MY DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice relative to the bill (H. R. 2820) "To clarify the right of sellers to engage in competition by in good faith meeting the equally low price of a competitor."

The bill would amend subsection 5 (a) of the Federal Trade Commission Act by adding thereto the following language:

"Nothing herein contained shall prevent a seller, not acting pursuant to any conspiracy, combination, or agreement in restraint of trade, from reducing his price in good faith to meet the equally low price of a competitor: *Provided*, That a seller shall not be deemed to have acted in good faith if he knew or should have known that the lower price which he met was unlawful."

The bill would also amend the Clayton Act by adding at the end of section 2 thereof the following new subsection:

"(g) In any proceeding involving an alleged violation of this section, it shall be a complete defense to a charge of discrimination in price or services or facilities furnished for the seller to show that his differential in price, or his furnishing of greater services or facilities, was made in good faith to meet the equally low price of, or the equally extensive services or facilities furnished by a competitor: *Provided*, That a seller shall not be deemed to have acted in good faith if he knew or should have known that the lower price or more extensive services or facilities which he met were in fact unlawful. The word 'price', as used in this section,

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shall mean the consideration paid or agreed to be paid by a purchaser for any commodity."

The bill is apparently intended to reaffirm the doctrine enunciated by the Supreme Court in *Standard Oil Co. v. Federal Trade Commission* (340 U. S. 231, 246-7). In that case the Court reversed the Circuit Court of Appeals for the Seventh Circuit by holding that under subsection 2 (b) of the Clayton Act it is a complete defense to a charge of price discrimination for the seller to show that his price differential has been made in good faith to meet a lawful and equally low price of a competitor. The dissenting opinion interprets the subsection to the effect that the good faith meeting of a competitor's price only rebuts the prima facie case of violation established by showing the price discrimination. The dissent would leave to the Commission the determination as to whether the proven price discrimination is of a character that violates subsection 2 (a) on a showing that there may be injury to competition.

An examination of the bill and an analysis of the majority opinion reveals that section 2 of the bill, with the exception of the definition of the term "price," does adopt to a considerable degree the language of the Court with respect to price discrimination.

The language of section 2 of the bill varies somewhat from the existing language of subsection 2 (b) of the Clayton Act, yet in many respects is very similar to it. First, both the bill and subsection 2 (b) appear to confine the use of the defense to a proceeding under section 2. The bill uses the language "In any proceeding involving an alleged violation of this section \* \* \*," while the existing language is "Upon proof being made, at any hearing on a complaint under this section \* \* \*." Second, the bill inserts "it shall be a complete defense to a charge of discrimination in price or services or facilities furnished for the seller \* \* \*," while the proviso in 2 (b) states "That nothing herein contained shall prevent a seller rebutting the prima facie case thus made \* \* \*." Third the bill follows with "to show that his differential in price, or his furnishing of greater services or facilities \* \* \*" while 2 (b) says "by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers \* \* \*." Fourth, both then follow with identical language with the exception of one word, "was in good faith to meet the (an) equally low price of \* \* \*." Finally, the bill rearranges and adds to the remaining language' to read "or the equally extensive services or facilities furnished by a competitor" while 2 (b) closes with "a competitor, or the services or facilities furnished by a competitor."

In the following respects section 2 of the bill and existing language of subsection 2 (b) differ: (a) The bill contains a proviso which negatives the good faith defense if the seller knew or should have known that the lower price or the more extensive services or facilities which he met were in fact unlawful. Existing language contains no such specific qualification, although the Supreme Court appears to have read such a qualification into it in the *Standard Oil* case. (b) The existing language authorizes the Commission to issue a cease and desist order against the person charged with discrimination, unless appropriate justification is affirmatively shown. The bill contains no such provision. (c) Existing language contains no definition of the term "price." The bill would provide such a definition.

In testimony before various committees of Congress and in reports and letters commenting on earlier proposals to amend subsection 2 (b), this Department has never urged the necessity or the desirability of legislation with respect to the pricing practices to which the legislation was directed. It should be noted, however, that the Department has always interpreted subsection 2 (b) as permitting a defendant to defend conclusively against a charge of price discrimination by affirmatively showing that such discrimination was made in good faith to meet the equally low price of a competitor.

With regard to the proposed definition of the term "price," this Department believes that the antitrust laws should be as flexible as the ingenuity of those who may profit by their violation. This is particularly true of legislative definitions with respect to the meaning of terms contained in those laws. As an illustration of the difficulty encountered in relating a definition to a given set of circumstances, the bill appears to define the word "price" in terms of the amount paid or agreed to be paid by the buyer as distinguished from the amount realized by the seller. Yet the true price received by the seller would seem to be what is left after deducting actual freight or the cost of other transportation allowances which may or may not reflect or represent the amount which the purchaser agrees to pay. The question then arises as to whether or not the definition would foreclose the

court from determining the true price. In this connection it is to be noted that the proposed definition would be applicable to all other provisions of section 2 of the Clayton Act which contain the word "price" but would apparently not be applicable to the provisions of the Federal Trade Commission Act.

The amendment to the Federal Trade Commission Act would have the effect of exempting independent sales made in good faith to meet the equally low price of a competitor from the unfair methods of competition or deceptive acts or trade practices covered by subsection 5 (a). As distinguished from the Clayton Act, no provisions respecting such sales are covered by existing language of the Federal Trade Commission Act.

In view of the decision of the Supreme Court in the Standard Oil case, the Department sees no necessity for the enactment of the proposed legislation; however if the Congress should decide to enact such legislation, the Department would have no objection to it. If the bill should receive favorable consideration, this Department would consider it preferable to amend subsection 2 (b) of the Clayton Act rather than to create an entirely new subsection. Also, it is believed that the language of the legislation should make perfectly clear that good faith meeting of a competitor's lower price, services, or facilities is an affirmative defense that must be proved by the one asserting it in conformity with the majority opinion in the Standard Oil case. It is further suggested that the definition of the term "price" be deleted, because such a term is subject to factual determination. Finally, your committee may desire to give further consideration to the practical effect of the proposed amendment to subsection 5 (a) of the Federal Trade Commission Act, and the advisability if such an amendment is deemed desirable, of making it parallel in language and application the proposed amendment to the Clayton Act.

The Director of the Bureau of the Budget has advised that there is no objection to the submission of this report.

Yours sincerely,

PEYTON FORD,  
Deputy Attorney General.

DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, July 13, 1951.

Hon. EMANUEL CELLER,  
*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, D. C.*

MY DEAR MR. CHAIRMAN: It has been suggested to us that our recent report to you on H. R. 2820 may be interpreted as expressing a preference on our part for a definition of the term "price" different from that presently set out in the bill. We want to take this opportunity to correct any such misinterpretation of our position.

The purpose of our reference to the "price" definition was solely one of pointing out the difficulty and inadvisability of defining the term in any way; we did not intend to suggest an alternative definition. We believe that words or terms such as "price," as used in the antitrust statutes, present questions of fact and not matters of law and for that reason their meaning should be judicially determined in each set of circumstances.

The advantages of a general statute governing antitrust problems were pointed out by Chief Justice Hughes in *Sugar Institute, Inc. v. United States* (297 U. S. 553, 600). He said:

"\* \* \* the Sherman Antitrust Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions."

This has proved to be sound policy in antitrust and related statutes. It permits the adaptation of the law to continually changing practices and methods. In the Sherman Act itself the offense is specified but it is not spelled out in detail. It is, however, sufficiently flexible to meet the demands for justice under shifting circumstances. A list of prohibitions would be an invitation to evasion.

In explaining why Congress in 1914 had adopted in the Federal Trade Commission Act the general standards of unfair conduct, Mr. Justice Brandeis said:

"Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission. Experience with existing law had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve hardship." (*Federal Trade Commission v. Gratz*, 253 U. S. 421, 436.)

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For the foregoing reasons we should like to make it clear to the members of the Committee on the Judiciary that we consider it undesirable to enact into statute law any definition of a term, such as "price," which is subject to factual determination.

The Director of the Bureau of the Budget has advised that there is no objection to the submission of this additional report on H. R. 2820.

Yours sincerely,

PEYTON FORD,  
*Deputy Attorney General.*

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STATEMENT ON H. R. 2820, EIGHTY-SECOND CONGRESS, BY STEPHEN J. SPINGARN, FEDERAL TRADE COMMISSIONER, BEFORE THE SUBCOMMITTEE ON THE STUDY OF MONOPOLY POWER, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, JULY 11, 1951

The Commission strongly urges that the committee does not approve H. R. 2820 in its present form. We are convinced that the bill would definitely weaken the Commission's ability to stop price fixing combinations and other monopolistic and oppressive practices.

H. R. 2820 is in two sections—the first amending section 5 of the Federal Trade Commission Act and the other amending section 2 of the Clayton Act. At first glance, the sections appear to be identical, but actually they are addressed to two wholly different problems and would have quite different effects. Section 2 is, except for a definition of price, identical with S. 719, the McCarran bill, which was recently reported out of the Senate Judiciary Committee and is now pending for consideration in the Senate. It relates to the "good faith defense" to a charge of price discrimination under section 2 (a) of the Clayton Act and its sponsors in the Senate have stated that its sole purpose is to write into the statute in clear and unambiguous terms the decisions of the Supreme Court in the recent case of *Standard Oil Co. v. F. T. C.* (340 U. S. 231).

Section 1 of the bill, however, provides that nothing in section 5 of the Federal Trade Commission Act shall prevent a seller, not acting pursuant to combination, conspiracy, or agreement in restraint of trade, from reducing his price in good faith to meet the equally low price of a competitor, providing that a seller shall not be deemed to be acting in good faith if he knew or should have known that the price being met was unlawful.

I call your particular attention to the fact that the language of section 1 does not relate to a defense against a charge of price discrimination—it places completely beyond the act, whatever the basis of the charge, any situation in which a seller reduces his price to meet that of a competitor, except where it can be shown independently that such seller is acting pursuant to combination or agreement.

To provide a background for our comments about this first section, I wish to recall to the committee some of the legislative history of the Federal Trade Commission Act and the basic objectives of the standards contained in the section 5 this bill would amend.

Both the Clayton and Federal Trade Commission Acts were originally enacted in 1914, nearly 25 years after the Sherman Act. This quarter century of experience with the Sherman Act had convinced the Congress that it was essential to create some Government agency with power to stop monopoly in its incipient stages—that trying to break up a monopoly after it had become entrenched was often as difficult as trying to make eggs out of an omelet. It was decided to create an agency with power to prevent and discourage those practices which are oppressive of honest competitors and the consuming public and which, if left to run their course, might reasonably be expected to develop into full-fledged monopolies.

There were several different approaches suggested to this problem. It was considered, for instance, that Congress might attempt to draft a law which would prohibit in detail all of those specific practices which were then known to be the means by which the unscrupulous traders take an unfair advantage over their competitors and the public. It soon became apparent to Congress that this approach would require the writing of a huge and technical code of regulations of commercial conduct and that, no matter how carefully drawn, this code would be subject to the need for constant revision and amplification in order to make it completely responsive to the rapidly changing face of American business. It was finally decided to create an agency with the power to prevent all practices which might fit within the broad category of "unfair methods of competition in

commerce," recognizing that this would permit the Commission and the courts to consider business practices in the light of their usages in trade and to prohibit those which were fraudulent, monopolistic, oppressive, or which showed a dangerous tendency unduly to restrain trade, in whatever form they might appear.

When Congress made this decision it was aware not only of the ingenuity of American businessmen to promote the general welfare by producing more and better products but also of the willingness on the part of some, on occasion, to take advantage of the public and their competitors through unscrupulous means. It was aware, for instance, of such ingenious devices as that of a fish packer who placed on the label of canned chum salmon the statement "Guaranteed not to turn pink in the can." We think that Congress was eminently wise in choosing this approach to the problem and that no one could have drawn a code of business conduct which would spell out in detail every act or practice which might be prohibited and which would still have anticipated such matters as, for instance, the activities of a group of local merchants who devised the plan of sponsoring matinees at the local theater and requiring as the price of admission one copy of the current catalog of a well-known mail order house. The mail order company, whose catalogs disappeared from a very wide area, felt aggrieved at this method of competition and the Commission was inclined to agree with them. Nor could any statute have anticipated the ingenuity of one man who, after a proceeding in which he was found to have falsely advertised his product, placed on his label the legend "This product has been cited by the Federal Trade Commission." Likewise, it would have been difficult to anticipate the activities of a group of officials of one of the largest packing companies who bought up for their own interest, a small company selling equipment to railroads, and thereafter promoted the sale of this railroad equipment by making it known to the railroads that the packer's traffic would be handled by those railroads purchasing the equipment from the company privately controlled by the packer officials.

These are rather unusual instances of unfair methods of competition, but they serve to illustrate my point that many practices not in themselves necessarily unlawful can, under certain circumstances, be used in a very unfair way. Congress recognized this in drawing section 5 of the Federal Trade Commission Act and the courts have for many years spoken with approval of this approach to the problem.

In the *Schechter* case, the Supreme Court stated:

"The Federal Trade Commission Act (sec. 5) introduced the expression 'unfair methods of competition,' which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words 'unfair competition,' in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition, its scope being left to judicial determination as controversies arise. (*Federal Trade Comm'n v. Raladam Co.*, 283 U. S. 643, 648, 649; *Federal Trade Comm'n v. Keppel & Bro.*, 291 U. S. 304, 310-312.) What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest." (*A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U. S. 495, 532.)

In the case of *F. T. C. v. Beechnut Packing Co.* (257 U. S. 441), the Supreme Court interpreted the phrase "unfair methods of competition" and held that if a practice "is against public policy because of its 'dangerous tendency unduly to hinder competition or create monopoly' it was within the power of the Commission to make an order forbidding its continuance."

One of the finest statements of the considerations which persuaded Congress in choosing the particular machinery of section 5, and of the process for determining what specific practices fall within the broad phrase "unfair methods of competition," is the language of Mr. Justice Brandeis in his famous dissenting opinion in the case of *F. T. C. v. Gratz* (253 U. S. 421, 436).

"Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. In

leaving to the Commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of a century earlier, when by the act to regulate commerce it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage. (See *Pennsylvania Co. v. United States*, 236 U. S. 361; *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, 219, 220.) Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the Commission the duty of finding the facts; and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final. The question whether the method of competition pursued could, on those facts, reasonably be held by the Commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the court."

I wish to add, parenthetically, that while this language is from a dissenting opinion, it is one of those dissents which is generally recognized now as being authoritative. *Hastings Mfg. Co. v. F. T. C.* (153 F. 2d 253, 257 (1946)).

#### *Section 1 of the bill*

Section 1 of the bill seems to create an exemption for any practice, short of a combination subject to the Sherman Act, which is carried on through the meeting of a competitor's price and it would very clearly prevent both the Commission and the courts from considering the practice "in the light of particular competitive conditions and of what is found to be a specific and substantial public interest." We can see no reason for such an enactment, any more than for creating a specific exemption for a whole host of other intrinsically proper commercial practices. The Commission has time and again stated to the Congress and to the public that there is nothing inherently wrong about freight absorption, selling at delivered prices, or meeting a competitor's price, and that all of these practices are quite common and, for the most part, beyond question. There are some extreme instances, of course, where because of a monopolistic purpose, because of a severe restrictive effect upon competition, or because of other circumstances surrounding their use, the Commission and the courts have examined particular types of freight absorption, selling at delivered prices, and the meeting of competitors' prices to determine whether such practices are within the scope of the broad standard which I have been discussing. The bill seems designed to prevent this process and instead it would accord to the practice of meeting competitors' prices a very unusual preferred status.

If section 1 of the bill were to be enacted, it is conceivable that it could be used as an oppressive device to accomplish serious restraints on competition by dominant sellers in a near-monopoly position. The devices to which I refer are in addition to price discriminations which are the subject of section 2 of the bill.

In this connection, section 1 of S. 1008, Eighty-first Congress, passed by Congress last year but vetoed by the President, contained a similar provision to the effect that it shall not be an unfair method of competition under section 5 for a seller acting independently to sell at delivered prices or absorb freight. A proviso was added to the effect that this shall not make lawful any "combination, conspiracy or collusive agreement; or any monopolistic, oppressive, deceptive, or fraudulent practice, carried out by or involving the use of delivered prices or freight absorption." The problem of meeting a competitor's prices and that of freight absorption are closely related under the Federal Trade Commission Act, yet section 1 of the instant bill contains no safeguard whatever against use of such practices where they may involve monopolistic or oppressive results. Since the Commission had the feeling that comparable section 1 of S. 1008 might be construed in a way to impair effective enforcement of the act, omission from section 1 of H. R. 2820 of some of the safeguards which appeared in section 1 of S. 1008 would go even farther in weakening the Commission's power to prevent monopolistic practices.

Even more important is the effect that section 1 of the bill would have on the Commission's power to prevent price-fixing conspiracies. We recognize, of course, that even if the bill were enacted the Commission would be able to stop the matching of prices shown by independent evidence to be carried on pursuant to combination or conspiracy. This is not, however, a sufficient safeguard. In the more than 60 years since enactment of the Sherman Act, American businessmen have pretty thoroughly learned one lesson and that is "when we reach an understanding about prices, don't put it in the minutes and don't write any letters." The

modern conspiracy to fix prices is seldom capable of proof by direct evidence of overt acts of agreement. Thus, if the antitrust agencies are to be at all effective in stopping conspiracies in restraint of trade, they must be left free in the future as they have in the past to present to the Commission and to the courts in conspiracy cases all of the facts relating to the meeting of prices and suppression of competition, and the Commission and the courts must be left free to draw the proper inferences from all of the evidence.

In cases under section 2 of the Clayton Act, the so-called good faith defense has been important only in proceedings involving charges of price discrimination. Under section 5 of the Federal Trade Commission Act the so-called good faith defense has never been of any significance, except to the extent that persons charged with price fixing have sought to convince the Commission and the courts that apparent identity of pricing practices and absence of price competition has been the normal result of each seller independently meeting in good faith the prices of his competitors. The Commission has investigated charges of price fixing in a good many industries where it seemed likely that apparent price similarity was in fact the product of normal competitive processes, and in those cases we have closed our files without bringing any action. In other cases, however, Commission investigations have shown an identity of prices and terms and conditions of sale under circumstances which would lead a reasonable man to conclude that the parties were acting pursuant to agreement or understanding to match prices. In those cases the Commission has issued complaints charging an agreement or understanding to fix prices, and in at least half of these cases the persons charged have admitted the conspiracy and assented to the entry of an order. In other cases the issues have been fully litigated and the Commission has decided, on the basis of all of the record facts, that an agreement was properly inferable from the course of conduct of the parties, that their acts simply could not have produced the result shown unless they had reached an understanding. I would like to read to you briefly from a few of the decisions of the courts of appeals in this type of case showing the setting in which the court placed evidence of matched prices among competitors as it was found in these cases.

In the case of *U. S. Maltsters Assn. v. F. T. C.* (152 F. 2d 161 (1945)), the Court of Appeals for the Seventh Circuit observed:

"We are of the view that the Commission's findings that a price-fixing agreement existed must be accepted. Any other conclusion would do violence to common sense and the realities of the situation. The fact that petitioners utilized a system which enabled them to deliver malt at every point of destination at exactly the same price is a persuasive circumstance in itself. Especially is this so when it is considered that petitioners' plants are located in four different States and that the barley from which the malt is manufactured is procured from eight or nine different States. Of further significance is the uniformity by which prices were increased and decreased. When a member announced an increase in price, that information was flashed by telegram to every other member and they immediately announced a like increase. When a member announced a decrease in price, such announcement was likewise flashed to all other members and they at once proceeded to announce a similar decrease. It may be true, as pointed out by petitioners, that a decrease in price by all members is necessary when such decrease is announced by any one member in order to meet competition. It certainly cannot be claimed, however, that it is necessary that all members increase their prices upon announcement of an increase by one member in order to meet competition."

In the case of *Milk and Ice Cream Can Institute v. F. T. C.* (152 F. 2d 478 (1946)), the Court of Appeals for the Seventh Circuit observed:

"The Commission found that 'with the exception of short periods of time while adjustments in prices were being made, the prices charged by the respective respondent members (petitioners here) both f. o. b. and delivered, had been uniform and identical.' Petitioners do not seriously challenge this finding. The record fully discloses that such was the situation for at least a period of more than 4 years immediately prior to the time of the commencement of the instant proceeding. To illustrate, a customer located in St. Paul could purchase cans at the same delivered price irrespective of whether the purchase was made from a member located in Chicago or St. Paul. Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible, to visualize. The mere fact that the situation did exist in and of itself furnishes strong support that the institute and its members were acting cooperatively and by agreement. It is contended, however, that the same delivered price, even though the result of a plan or agreement, did not affect price competition. In fact, it is argued that an identical delivered price is in aid

of price competition. Not being economists, we confess our inability to comprehend such an argument. True, the same delivered price might still leave room for competition, depending upon the circumstances of the case. This is so for the reason that there might be competitive factors other than price, such as quality and the appearance of the product. But insofar as price competition is concerned, we think that an agreement among manufacturers of a product to sell at the same delivered price would seriously interfere with, if not entirely destroy, competition in that respect."

In a number of other cases the courts have commented upon similar circumstantial evidence of price fixing and the weight which should be attributed to concerted acts resulting in elimination of price competition. (*Eugene Dietzgen Co. v. F. T. C.*, 142 F. 2d 321 (1944). *Fort Howard Paper Co. v. F. T. C.*, 156 F. 2d 899 (1946), cert. denied 329 U. S. 795. *F. T. C. v. Cement Institute, et al.*, 333 U. S. 683. *Triangle Conduit & Cable Co., Inc., et al. v. F. T. C.*, 168 F. 2d 175 (1948).)

Please do not misunderstand me. No one on the Commission or its staff or on the bench in reviewing Commission decisions would see anything ulterior in the fact that two delicatessens on opposite corners should have a 19-cent price tag on a package of macaroni on Monday morning, or even all week, or even on four or five items. There is nothing sinister about two competitors selling their products at the same price, at the same time, in the same market. We do often raise our eyebrows when an entire industry simultaneously shows up with a very complicated delivered price system, perhaps based on arbitrary factors, and follows it to the extent that both offering prices and selling prices are identical among all sellers and to any particular buyer without regard to such factors as raw-material costs, location to the market, differences in quality, design, etc. And unless we were curious about such situations we would be grossly negligent about our responsibilities.

You may feel that we are unduly sensitive and apprehensive about the effects of this bill. However, we know that many persons in the recent controversy over delivered prices and freight absorption urged that proposed legislation should limit the right of the Commission and the courts to consider freight absorption and delivered prices as evidence in a price-fixing case. For instance, in a statement to the Senate Committee on the Judiciary, April 4, 1949, Raymond S. Smethurst, counsel for the National Association of Manufacturers, strongly recommended that S. 1008, which was then pending in its original version, providing only for a moratorium on pricing practices, be amended to prevent the Commission and the courts from considering the sort of evidence discussed above in a conspiracy case. He said:

"Secondly, the bill does nothing with respect to evidentiary requirements for proving conspiracy. Thus the Commission could still use more uniformity of price or business practices as evidence upon which to base a finding and conclusion of the presence of a 'planned common course of action.' (See FTC order in Cement case.) No adequate protection, therefore, would be afforded members of industries which have historically used various forms of delivered pricing systems.

"Because of the lax evidentiary standards discussed above, I suggest an appropriate amendment to prevent the using of a delivered price system during the moratorium period from being admissible as evidence of a conspiracy in any proceeding brought after the moratorium has expired."

We feel that section 1 of this bill meets the objection which the National Association of Manufacturers had to the original version of S. 1008 and that it would very definitely prevent the Commission from considering the meeting of competitive prices in a case where organized price fixing is the central charge unless and until the fact of conspiracy could be established by other and independent evidence, a condition very difficult to satisfy in the ordinary case.

We are convinced that, if enacted, this bill will have the practical effect of restoring basing point price-fixing systems. We believe that it will legalize the very type of situation described by Senator Douglas in the debate on S. 1008. He said:

"Last summer I called attention to the fact that in January 1947, the Illinois Department of Highways had asked for bids on some 50,000 barrels of cement delivered inside each of the 102 counties in the State. In response to this invitation, eight firms submitted sealed bids, and each of the eight firms bid exactly the same figure for cement to be delivered in each of the 102 counties. Again I wish to emphasize that the bids differed as between counties, but they were identical for each county. The prices bid varied from county to county, but in

each of the 102 counties the eight firms had all bid alike. I had asked Prof. C. O. Oakley, of the department of mathematics of Haverford College, to analyze this record and to state what the chance was that such identity of eight bids in each of the 102 counties could come about purely by chance. Professor Oakley authorized me to say that this chance was about 1 in 8 followed by 214 zeros. As a further translation of this astronomical figure, Professor Oakley went on to say that to accomplish such price identity as this merely by accident would be far more difficult than picking out at random a single predetermined electron in the total universe." (Congressional Record, May 31, 1950, p. 7961.)

The quoting of exactly identical delivered prices, down to the thousandth of a cent, is the fundamental purpose and objective of basing point price-fixing systems. Where prices at each and every destination point are exactly identical, where their identity is brought about through systematic and reciprocal freight absorption, implemented through the use of common freight rate books, common extra books, etc., the Commission has on occasion come to the conclusion that such identity could simply not be the result of pure chance.

On reading the hearings held by this committee on the steel industry, I find that the reaction of the chairman to identical prices in the steel industry is pretty much the same as the reaction of the Federal Trade Commission. In those hearings, the counsel to the committee called attention to a number of instances of identical bids, one of which involved exactly identical bids at 0.4722 cents, or down to four decimal places, submitted by five different steel companies. A vice president of United States Steel attempted to explain away this identity on the grounds that it was merely the result of "competition." To this argument the chairman remarked:

"Well, with all due respects, I think that that explanation is a bit of sophistry. I think there was undoubtedly some arrangement between those companies. Otherwise there would not be a price exactly to the extent of four decimal points for a shipment of sheets and those kinds of products to the United States Navy. I cannot conceive of it" (hearings, pt. 4A, p. 599).

We are convinced that this bill would have the effect of legalizing the very type of situation which the chairman says he "cannot conceive of" as resulting from anything except "some arrangement."

We are confident that H. R. 2820 would have this effect not only because of its own wording but also because of the majority report on the companion bill in the Senate, S 719, the McCarran bill.

In view of the general language of these matters, it can be anticipated that the accompanying committee reports will be given great weight by the courts in determining the intent of Congress. Now what does the accompanying report on S. 719 have to say on this question of the importance to be attached to evidence in the form of identical, uniform prices? It says that while such evidence is "admissible," "no adverse inference" is to be drawn from it. May I quote the relevant passage:

"Whenever several sellers are charged with a conspiracy to fix prices, evidence that they sold at identical prices is admissible. Such evidence alone does not prove, however, that the identical prices resulted from a conspiracy to fix prices. \* \* \* The period of time during which, and the rigidity with which, sellers sold at like prices also is admissible evidence under a charge of conspiracy. Here again such evidence alone does not prove, and no adverse inference may be drawn from the frequency or regularity with which a seller meets or offers to meet his competitor's lower prices" (S. Rept. No. 293, 82d Cong., p. 6).

In other words, even though the chance of a price identity occurring by accident is less than the chance of picking out at random a predetermined electron from the universe, "no adverse inference may be drawn."

It is interesting to note that this instruction to the courts in the majority report explicitly relates to "conspiracy" cases, although the Senate bill itself is not concerned with conspiracy but only with price discrimination. In thus giving this instruction to the courts, it would appear that the sponsors of S 719 are going out of their way in order to be absolutely certain that no inference of collusion can possibly be drawn from identical prices no matter how widespread they may be, how long they may have existed or how unlikely are the chances that they have resulted from mere happenstance.

It may be that the sponsors of this bill did not intend that it should have such broad and sweeping effects upon section 5 of the Federal Trade Commission Act and that their purpose was simply to provide that having amended the Clayton Act relating to a defense against price discrimination the same defense should be written into the Federal Trade Commission Act so that the Commission could

not bring a charge of price discrimination as an unfair method of competition under the Federal Trade Commission Act and deny the good faith defense. The language of section 1 goes far beyond any such purpose and, in any event, such an amendment to section 5 would be wholly unnecessary under well-settled rules of statutory construction. If we were to concede, for purposes of this discussion, that the Commission could bring a charge of price discrimination, not under the special statute dealing with price discrimination, but under the broad and general provisions of section 5 of the Federal Trade Commission Act, any defense available under section 2 (a) of the Clayton Act would likewise be available under the Federal Trade Commission Act. The law speaks of two statutes covering the same acts as being *in pari materia*.

It is a fundamental proposition of law that statutes *in pari materia* must be considered together, and that the statute of general application cannot properly be interpreted in such a way as to be inconsistent with the statute of specific application. (Crawford on Statutory Construction, 429 (1940); Sutherland's Statutory Construction, sec. 5204 (3rd Ed., 1943).)

It is perfectly plain, therefore, that any defense provided in the Clayton Act, a statute relating to specific practices of discrimination, must likewise be available to one charged with a discrimination under a statute of general applicability, such as the Federal Trade Commission Act.

Section 1 of the bill is wholly unnecessary, even for the very limited purpose of safeguarding the good faith defense to a charge of price discrimination brought under the Federal Trade Commission Act.

#### *Section 2 of the bill*

Section 2 of H. R. 2820 would add a new subsection to section 2 of the Clayton Act making the meeting of an equally low price of a competitor in good faith a complete defense to a charge of unlawful price discrimination, writing into the statute the interpretation of existing law expressed by the Supreme Court in the case of *Standard Oil Co. v. F. T. C.* (340 U. S. 231), decided on January 8, 1951, in addition to undertaking to define one aspect of the term "good faith." The bill, however, might be construed as shifting the burden of proof in certain respects from the respondent to the Commission in cases involving the "good faith" defense. If this construction is correct, the bill goes beyond the decision of the Supreme Court.

As I stated previously, in the Federal Trade Commission Act the Congress directed the Commission to prevent all practices falling within the broad category of "unfair methods of competition"; while in the Clayton Act certain specific practices were prohibited, such as price discriminations, tying contracts, mergers among competitors, and interlocking directorates, which were known then to be the principal means by which monopoly power is achieved.

Congress had before it a record of the notorious discriminations of the old Standard Oil Trust and others, and it forbade discriminations where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." To this basic prohibition of discrimination a proviso was added as follows:

*"Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition."*

After several years experience in administering the statute it became apparent that the effect of this proviso was to make enforcement of section 2 of the Clayton Act relatively ineffective.

By 1928 the Congress became acutely aware again of the problem of discrimination and the lack of effectiveness of section 2 of the Clayton Act in preventing discriminations, particularly with reference to chain stores. The Commission was directed by Senate Resolution 224, Seventieth Congress, first session, to undertake a comprehensive investigation and study of chain stores and to report to the Congress on the practices leading to their growth and its recommendations for additional legislation.

Over a period of 6 years the Commission submitted to the Congress more than 30 separate factual studies pursuant to this resolution and a final report on its investigation on December 14, 1934 (S. Doc. 4, 74th Cong., 1st sess.). In that investigation the Commission found these significant facts:

1. That it had been the persistent policy of the chain stores to seek out and demand special and unwarranted price concessions on the goods they bought; and

2. That the chains in many instances discriminated in the resale of merchandise by maintaining higher prices in localities where competition was absent or weak, and cutting prices aggressively in those localities where aggressive competition was encountered.

In commenting on the effect of the good faith proviso on the special concessions obtained by the chains as buyers, the Commission stated:

"Discriminatory price concessions given to prevent the loss of a chain store's business to a competing manufacturer, to prevent it manufacturing its own goods, or to prevent it from discouraging in its stores the sale of a given manufacturer's goods, may be strongly urged by the manufacturer as 'made in good faith to meet competition'."

The following statement was made regarding the status of discrimination by the chains in the resale of goods and the question of the good faith proviso:

"Variation in price between different branches of a chain would seem to be discrimination, the effect of which 'may be' to produce the forbidden results. It is one thing, however, to reach such a broad conclusion on the results of this practice by chains in general and quite another to prevent by legal means its use by some particular chain. The reason is that the Clayton Act itself specifically permits price discrimination 'in the same or different communities made in good faith to meet competition.' The Commission has no evidence which would establish that price discrimination by chain stores has not been in good faith to meet competition and there is good ground to conclude that in many cases it has been for that purpose.

"Difficult legal questions arise in this connection, such as whether a price discriminator may merely 'meet' the price of a competitor or may beat it, and whether a concern which occupies a monopolistic position has the right to maintain itself by discriminating in good faith to meet competition. If the monopoly be considered legal it is difficult to deny it the same privilege of protection against competition which the statute assures the independent. Yet that creates the anomaly of a monopoly being allowed to use the same weapons to maintain itself which are denied to others for fear of creating monopoly."

In recommending legislation to correct the conditions discovered in the chain-store investigation, the Commission advocated that the good-faith proviso be eliminated from the statute and that section 2 of the act be rewritten to provide simply that:

"It shall be unlawful for any person engaged in commerce, in any transaction in or affecting such commerce, either directly or indirectly to discriminate unfairly or unjustly in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States."

The Robinson-Patman Act of 1936 constituted a major overhaul of section 2 of the Clayton Act designed primarily to correct the conditions discovered by the Commission in its chain-store investigation. Section 2 (a) was redrafted to make unlawful not only discriminations which may substantially lessen competition or tend to create a monopoly in any line of commerce, but also those discriminations which may injure, destroy, or prevent competition with a particular person. The cost proviso was rewritten to make it plain that discriminations based on quantity could only be justified to the extent of actual savings. Payments of brokerage commissions directly to buyers, a favorite device employed by the chain stores for securing price concessions were prohibited in a new subsection (c). Subsections (d) and (e) prohibited payments for services and facilities except on proportionally equal terms, and subsection (f) made the buyer who induces an unlawful discrimination in price equally liable with the seller. A new approach was added in section 2 (a) whereby the Commission was empowered when it finds purchasers in large quantities so few as to render differentials on account of such quantities unjustly discriminatory, to set quantity limits beyond which no discounts may be given, even though they might be justifiable under the cost savings proviso. In section 3 of the Robinson-Patman Act criminal sanctions were made available against certain discriminations. And finally, Congress completely rewrote the good-faith proviso, and placed it in a separate subsection, in language which the Commission construed as limiting the good faith defense to a procedural matter, unavailable in the face of a showing that the discrimination may have the effects specified in section 2 (a).

The Supreme Court has now decided that Congress did not limit the good-faith proviso, and the good-faith defense, when established, is complete under the Robinson-Patman Act as it was under the original section 2 of the Clayton

Act. Section 2 of H. R. 2820 would confirm that this is the intent of Congress, and represents a reversal of the previous efforts to limit the good-faith proviso and make it subsidiary to the basic policy of preserving commerce from substantial suppression of competition.

The Commission can see no reason why the difficulties arising from an unqualified good-faith defense which were pointed out in 1934 are not equally important in 1951. To reaffirm the good-faith proviso as a complete defense, regardless of the effects which may flow from discriminations, again raises the anomaly of monopoly power being permitted to use the same weapons to maintain itself which are denied to others for fear of creating a monopoly.

Discriminatory selling has long been recognized as a practice which works to the advantage of big business and toward the destruction of small business. Discriminatory selling has thus long been recognized as a practice which works in two ways toward the creation of monopoly. First, discriminatory selling is a practice by which large sellers destroy smaller competing sellers. This is true whether or not the large seller intends any injury to his smaller rivals. Second, discriminatory selling results in advantageous purchase terms to big buyers and in disadvantageous purchase terms to the small buyer. Discriminations in favor of the large buyer are, moreover, typically in excess of any savings in the seller's costs of supplying the large buyers as compared to his costs of supplying other buyers.

We do not believe that discriminatory selling is any less a force for destroying competition among sellers than it is for destroying competition among buyers. Nor do we believe that discriminations which merely meet the price of a competitor are much less a force for destroying competition than are discriminations which undercut the price of a competitor. On the contrary, we concur with the Senate report on the Robinson-Patman bill which stated:

"The weakness of present section 2 lies principally in the fact that: (1) It places no limit upon differentials permissible on account of differences in quantity; and (2) it permits discriminations to meet competition, and thus tends to substitute the remedies of retaliation for those of law, with destructive consequences to the central object of the bill. Liberty to meet competition which can be met only by price cuts at the expense of customers elsewhere, is in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency. While the bill as now reported closes these dangerous loopholes, it leaves the fields of competition free and open to the most efficient, and thus in fact protects them the more securely against inundations of mere power and size." (S. Rept. No. 1502, To Amend Antitrust Act, Jan. 16, 1936, 74th Cong., 2d sess.)

While the Commission is firmly convinced that the good-faith defense should not be available as a justification for discriminations which have a substantial and serious effect toward monopoly, we recognize that there is an area in which it may be desirable to permit justification on this basis for discriminations whose effects, while still within the test of section 2 (a), fall short of substantially suppressing competition or tending to monopoly in a line of commerce. It is suggested that this can be accomplished by establishing good faith as a complete defense except in those cases where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

The standard of injury in section 2 of the Clayton Act was broadened by the Robinson-Patman Act to include discriminations not only where the effect may be to substantially lessen competition or tend toward monopoly in a line of competition, but also where the effect may be to injure, destroy, or prevent competition "with any person who either grants or knowingly receives the benefit of such discrimination or with the customers of either of them." We can see no particular objection to making the good-faith defense available as to discriminations which injure, destroy or prevent competition with a particular person, but which still fall short of substantially lessening competition or tending to create monopoly in a line of commerce.

Several other observations may be made regarding the provisions of section 2 of the bill. It would create a new subsection (g), leaving undisturbed the language of subsection (b) which contains the basic proviso relating to the good faith defense. The provisions of the statute would seem less confusing if amendments affecting subsection (b) were made directly to that subsection rather than by way of a new subsection.

Section 2 also contains a proviso to the effect that a seller shall not be deemed to have acted in good faith if he knew or should have known that the price being

met is unlawful. In the decision of the Supreme Court in the Standard Oil case it was observed that the good faith defense was limited to the meeting of a "lawful" price, and the statute now provides that the burden of sustaining justification rests wholly with the one charged with unlawful discrimination. This proviso may well be argued as shifting to the Commission part of the burden of showing lack of justification, a shift which would not be desirable from the standpoint of effective enforcement of the statute.

In the Senate committee report on S. 719, a bill which contains language identical to section 2 of this bill, the following comment was made about this proviso:

"The proposed amendment adopts the standards of the Staley case by providing expressly that only where the seller knew or should have known of the illegality of his competitor's prices, is he in jeopardy of being found to be acting in bad faith."

While the language of the proviso itself is not entirely clear, the construction given it by this committee report in the Senate is all too clear. The committee report apparently assumes that the question of whether a seller knew or should have known about the legality of the price being met is determinative of the question of good faith. The process for determining whether a man has acted in good faith in any particular situation requires taking into account a great many factors in addition to knowledge of the legality of a competitor's price. This construction of the proviso would prevent the Commission from considering any of the other factors which might be relevant to the question of good faith and sweep away an important safeguard against monopolistic discriminations. We recommend that the proviso be deleted.

To accomplish the changes recommended in section 2 of the bill, it is suggested that it be amended to revise section 2 (b) of the Clayton Act as follows, the underlined portion representing language which would be new to the statute:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however, That unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, it shall be a complete defense for a seller to show that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.*"

#### CONCLUSION

In conclusion, the Commission is opposed to section 1 of the bill in its entirety and recommends that the section be deleted. We are likewise opposed to section 2 of the bill in its present form and suggest that it be amended as previously suggested. Commissioner Mason dissents from the views of the Commission on H. R. 2820. He approves the bill in its present form. Commissioner Ayres does not oppose the purpose of section 2 of the bill but does not consider that any legislation to this effect is necessary because the purpose of the bill has already been accomplished by the decision of the Supreme Court in the Standard Oil Company case. However, Commissioner Ayres agrees with the views of the Commission on section 1 of the bill.

We deeply appreciate this opportunity of expressing our views on the bill and we know that these views will have the serious consideration of this committee, which has contributed so much in recent years to real strengthening of the antitrust laws by sponsoring legislation to plug up the loophole in section 7 of the Clayton Act, increasing the penalties for violation of the Sherman Act, and other matters. With this sort of record of earnest support of the antitrust laws and of accomplishment in strengthening measures to make them more effective as a safeguard to our free enterprise system, we are sure that the committee will not approve legislation which goes in the opposite direction.

